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Active Judicial Governance

JAMES A. GARDNER*

INTRODUCTION

Over a long career, U.S. Supreme Court Justice Antonin Scalia often presented himself as a populist deflator of the pompous. One of his favorite targets was judges, whom Scalia seemed to believe held an excessively high and unjustified opinion of themselves. Like his former D.C. Circuit colleague Robert Bork, who famously described judges as “lawyers in robes,”¹ Scalia liked to remind judges that they were nothing more than everyday attorneys who happened to have been appointed to the bench. The transition in employment from lawyer to judge, he liked to imply, added nothing to their intelligence or wisdom. The Supreme Court itself was for Scalia merely “a committee of nine unelected lawyers”² whose members knew the answers to difficult questions no better than “nine people picked at random from the Kansas City telephone directory.”³

While in a democracy there is always something satisfying about seeing the mighty taken down a peg, this view of judges is highly disingenuous. Calling judges “lawyers in robes” is a bit like calling the President of the United States an ordinary citizen with a nuclear arsenal; the observation may be true in a sense, but that sense is largely irrelevant, for an ordinary citizen who holds the officially granted power to launch a nuclear strike is, by virtue of holding that power, far from ordinary. It is of course often true that individual judges have no greater wisdom or intelligence than other people—though in a well-functioning system of judicial selection perhaps they ought to—but that’s not the point. Judges, regardless of their

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¹ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 252 (1990).

² *Obergefell v. Hodges*, 135 S.Ct. 2584, 2629 (2015) (Scalia, J., dissenting).

³ *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

intelligence and wisdom, are, in virtue of being judges, government *officials*. In that role, as members of one of three co-equal branches of government, they *govern*. To be sure, judges do not govern alone—they do so in concert with the legislative and executive branches—but they nonetheless share the burden of governance. That is what makes them more than lawyers in robes.

Professor Jonathan Marshfield's excellent new paper, *Courts and Informal Constitutional Change in the States*,⁴ provides suggestive, but nevertheless impressive, evidence that state high court judges—contrary to the view expressed by Justice Scalia—both recognize and embrace their role as active participants in the processes of democratic self-governance. This is not to say that they lack humility; it is to say merely that they seem to possess a different and more nuanced understanding of the role of courts in American government than some of their federal counterparts.

I.

Marshfield's subject is constitutional change—the means and mechanisms, both formal and informal, by which constitutions change their meaning and operation.⁵ His project is to test empirically a proposition of received wisdom holding that the difficulty of formal constitutional amendment and the frequency of informal constitutional change are inversely related.⁶ This proposition assumes that demand for change eventually builds up in any constitutional system, and that this demand is more likely to be satisfied through formal processes of constitutional amendment when formal amendment is relatively easy. When formal amendment is difficult, the demand for constitutional change is more likely to be satisfied through informal means, such as judicial reinterpretation⁷ or changes in official practice.⁸

Marshfield puts this proposition to the test by painstakingly examining the entire corpus of state supreme court decisions over a thirty-five-year period, looking for instances in which courts have overruled their own prior decisions in cases construing the state constitution.⁹ Although informal constitutional change can occur in many ways, and such change can sometimes be hard to detect, judicial overrulings provide indisputable

⁴ See generally Jonathan L. Marshfield, *Courts and Informal Constitutional Change in the States*, 52 New. Eng. L. Rev. 453 (2017).

⁵ See generally *id.*

⁶ *Id.* at 460–61.

⁷ The best-known account of this kind of change is undoubtedly 1 BRUCE ACKERMAN, *WE THE PEOPLE* (1991).

⁸ See generally James A. Gardner, *Practice-Driven Changes to Constitutional Structures of Governance*, 69 ARK. L. REV. 335 (2016).

⁹ Marshfield, *supra* note 4, at 460–61.

evidence of informal constitutional change because a court is openly changing its own interpretation of a constitutional provision.

Marshfield's findings are surprising. State constitutions are, by and large, far easier to amend than the U.S. Constitution,¹⁰ suggesting that demand for constitutional change at the state level should be satisfied much more commonly by formal than by informal amendment. Although state constitutions have indeed undergone frequent formal amendment, Marshfield finds that they also have been amended informally, through judicial overruling, with great frequency.¹¹ He thus identifies a significant flaw in the received wisdom, requiring scholars to rethink their understanding of the drivers of constitutional change.

II.

Before turning to the implications of Marshfield's study, I want to mention briefly its limitations. I stress that these limitations in no way undermine the force of the study. Marshfield is well aware of and openly acknowledges these limitations; and the limitations suggest not that the study is doubtful, but quite the opposite—that it greatly underestimates the strength of the very interesting phenomenon it persuasively identifies.

The main shortcoming of the study is a consequence of its methodology—by examining only explicit judicial *overruling* of prior decisional law, the study very likely grossly *underestimates* the extent of informal judicial amendment of state constitutions. Explicit judicial overruling of prior decisions is a comparatively rare event in any court, including state supreme courts. American constitutional law is usefully and, in my view, accurately conceived as subject to development through a methodology much like common law adjudication.¹² This technique, which allows courts to develop the law by distinguishing and reinterpreting precedent, gives courts the flexibility to alter constitutional doctrine incrementally, without resorting to direct and formal overruling. Moreover, because overruling is generally disfavored, many overrulings are surreptitious, and therefore not expressly announced. Any attempt to measure the extent of informal constitutional change resulting from judicial reinterpretation by including only express overruling is therefore highly likely to underestimate its incidence in the relevant decisional law. Indeed, I would venture to guess that the body of decisional law altering the meaning of state constitutions through common law and surreptitious overruling dwarfs the body of case law in which courts openly announce what they are doing. Thus, Marshfield's study, though commendable for its validity and

¹⁰ G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 34–37 (1998).

¹¹ Marshfield, *supra* note 4, at 493–502.

¹² See generally DAVID STRAUSS, THE LIVING CONSTITUTION (2010).

reproducibility, very likely understates dramatically the extent of informal constitutional change on the state level.

A second shortcoming of the study is that the case selection method, by confining itself to explicit overrulings, biases the results in favor of areas of state constitutional law with a substantial preexisting jurisprudence. As anyone who has studied American subnational constitutional law well knows, there is a great deal of variation across the subject matter of state constitutions in the extent to which provisions of state constitutions have been subject to judicial construction.¹³ Because state courts are the main workhorses of the criminal law, state constitutional provisions relating to criminal procedure are often thoroughly and extensively construed, with substantial bodies of local decisional law.¹⁴ But many parts of state constitutions, often including structural and fiscal provisions, remain surprisingly underdeveloped by judicial interpretation. In those areas, any judicial intervention at all has the capacity to make an informal adjustment to the state constitution, but this will not be reflected in overrulings because there is little or no prior case law on point to overrule. This may help explain Marshfield's findings of a low incidence of overrulings in areas like constitutional structure and tax, which are often jurisprudentially underdeveloped. Controlling for the distribution of cases on judicial dockets would thus likely have made the study more accurate.

III.

These minor quibbles notwithstanding, Marshfield's study provides convincing evidence of an important fact: state high court judges participate actively and routinely in the processes of public governance, and they do so more openly and, apparently, with greater comfort and confidence than their federal counterparts.

It is easy to understand how legislatures and executives govern. Legislatures enact laws. Executives implement and enforce them. These are highly visible actions on a very public stage, and the actions of legislatures and executives often have immediate effects on the public at large. Courts, in contrast, often operate quietly outside the public eye. They spend a great deal of their time resolving disputes among private individuals. Unlike legislators and presidents or governors—who not only are free to pursue overtly partisan goals, but are elected precisely to do so—judges must act impartially, never prejudging, but treating equally all views presented to them as presumptively of equal validity, until proven wrong by evidence and the force of better argument. As a result, it is sometimes difficult to see

¹³ See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 780–81 (1991).

¹⁴ See generally, e.g., BARRY LATZER, *STATE CONSTITUTIONAL CRIMINAL LAW* (1995).

just how courts participate in the process of governance. Yet courts do participate in governance, and they are capable of doing so quite actively, though typically more intermittently than the other branches.

In the most straightforward sense, courts govern in a way not so different from the other branches—they exercise official judgment for the public good. That is, when confronted with a question of law that must be answered in order to resolve a specific case before them, judges are obliged, in cases where they have discretion, to exercise their judgment about the meaning of the law in a way that conduces to the public good.¹⁵ This obligation applies to the construction of any kind of law, but clearly has its most urgent application in cases requiring construction of the constitution, which, as the fundamental law of the state, affects the greatest number of people on the greatest number of occasions.

In some quarters, to be sure, the exercise of this kind of judicial judgment is often disparaged as judicial activism—alas, a highly politicized term in today’s partisan discourse.¹⁶ At the federal level, arguments against the validity of judicial activism do not, however, deny that judges labor under an obligation, in cases where they have discretion, to choose from among decisional options those outcomes that are most fully consistent with the public good. Instead, opponents of judicial activism tend to deny that judges have discretion. Originalism, for example, proceeds from the premise that the U.S. Constitution provides clear, concrete answers to virtually any conceivable question about its meaning, thereby depriving judges of any discretion in construing it.¹⁷ Federal judges, in the words of Chief Justice John Roberts, merely “call balls and strikes”;¹⁸ they are passive observers of objective phenomena.

State judges, however, have long been said to operate in a different jurisprudential environment than their federal counterparts, one that helps to alleviate concerns about their exercise of active judgment in matters concerning the common good. First, many state judges are elected, giving them a direct democratic pedigree that appointed federal judges lack, and making them democratically accountable to the public should their

¹⁵ For example, an ancient principle of statutory construction requires courts to construe statutes so as to avoid absurd consequences. *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486–87 (1868).

¹⁶ See, e.g., KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* (2006).

¹⁷ The *locus classicus* is Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). More recent versions of originalism may be more congenial to the possibility that constitutional meaning may be sufficiently indeterminate in some domains to require the exercise of some judicial discretion. See e.g., Andrew Coan, *Living Constitutional Theory*, 66 DUKE L.J. ONLINE 99 (2017).

¹⁸ Roberts: “My Job Is to Call Balls and Strikes and Not to Pitch or Bat,” CNN (Sept. 12, 2005), <https://perma.cc/W5TT-SJWV>.

judgments stray too far from what the electorate considers acceptable.¹⁹ Second, because state supreme court judges construe the law only for the polity of a single state, the stakes are lower. When the U.S. Supreme Court issues a constitutional ruling, the ruling applies uniformly across the nation. The lesser impact of state judicial rulings might thus legitimately prompt state judges to feel more comfortable experimenting with constitutional doctrine.²⁰

A second way in which state courts participate in governance is captured in dialogic theories of how the law develops.²¹ Such theories make both a descriptive and a normative claim. Descriptively, dialogic theories contend that the routine processes of government create a kind of cross-dialogue among governmental actors. For example, when a state legislature enacts a law, it may simultaneously initiate a dialogue among all three branches of state government about the merits of the law. The process might start when the governor vetoes it, explaining his objections. The legislature might then reconsider the law, taking into account the governor's objections, prompting him to sign the law. A lawsuit challenging the constitutionality of the law might then ensue. The state supreme court might invalidate the law on constitutional grounds, explain its reasoning, and send the law back to the legislature for further consideration in light of constitutional concerns. Eventually, the process may yield a law that takes into account adequately the different considerations that all three branches of government are charged with protecting.

As a descriptive matter, state courts also often participate in dialogue with courts in other jurisdictions. Although every state constitution is different, they contain many similarities—for example, all protect certain fundamental rights, and in many cases those rights protections are similar to ones contained in the Federal Bill of Rights. State courts called upon to construe provisions of their own state constitutions thus often find it useful to examine how other state courts have handled similar problems under their own constitutions. This kind of cross-jurisdictional consultation occurs even across the federal-state boundary: state courts are routinely influenced

¹⁹ JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 211–12 (2005).

²⁰ See Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Results*, 35 S.C. L. REV. 353, 396 (1984) ("state courts, by definition, are not subject to the same federalism concerns[,] i.e., concerns arising from the nationwide uniformity imposed by ruling of the U.S. Supreme Court).

²¹ See Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147–48 (1993); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 95–97 (2000).

by decisions of the U.S. Supreme Court,²² and vice versa.²³

But the most significant claim of dialogic theories is normative: they argue that this kind of interinstitutional dialogue benefits the entire system because it leads officials to learn from one another. This learning, in turn, ideally may precipitate an eventual system-wide convergence on the best solutions to common problems. Indeed, the results may be even more profound; as Lawrence Sager has argued, this process of dialogue may lead to “moral progress” when state courts “make the benefits of their moral imagination available to the nation.”²⁴ In other words, when enterprising state courts experiment with constitutional implementation of previously unrecognized constitutional principles, other states observe the experiment from afar, and then embrace it if it proves successful. Eventually, the federal government itself may come around. This is, without a doubt, the story of the rapid adoption in the United States of constitutional protection for sex and marriage among gays and lesbians.²⁵

A third way in which state courts participate in governance is by participating in processes of subnational monitoring of national power.²⁶ The basic premise of our federal system is that power is divided to prevent any official from accumulating power so concentrated as to present a risk of tyranny.²⁷ This division of power is maintained through a process of mutual checking in which the state and federal governments monitor the behavior of officials at the other level and, when necessary, deploy their own power to check and resist abuses.²⁸ Courts may take an active role in this dynamic by using their role as superintendents of subnational constitutional law to register approval or disapproval of national jurisprudential trends.²⁹ This occurs most commonly when the federal and state constitutions provide duplicative protection for the same fundamental rights. When the Supreme Court issues a ruling that, in the opinion of state court judges, construes a federally protected right too narrowly, state judges may publicly register their disapproval by construing a similar provision of the state constitution

²² This influence is often said to be excessive, and has been criticized as a form of inappropriate lockstep interpretation. See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 193–232 (2009).

²³ See GARDNER, *supra* note 19, at 104–10.

²⁴ Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, in *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW* 17, 18 (James A. Gardner & Jim Rossi eds., 2011).

²⁵ See GARDNER, *supra* note 19, at 100–03, 106; Neal Devins, *How State Supreme Courts Take Consequences Into Account: Towards a State-Centered Understanding of State Constitutionalism*, 62 *STAN. L. REV.* 1629, 1630–34 (2010).

²⁶ See GARDNER, *supra* note 19, at 180–227.

²⁷ James Madison, *The Federalist* No. 47, N.Y. Packet, Feb. 1, 1788.

²⁸ See James Madison, *The Federalist* No. 51, N.Y. Packet, Feb. 8, 1788.

²⁹ GARDNER, *supra* note 19, at 186–98.

to provide broader protection. Again, this kind of very public objection to Supreme Court jurisprudence was instrumental in convincing the Supreme Court to reverse its ruling upholding the constitutionality of criminal punishment of gay sex.³⁰ On the other hand, when state courts approve of the direction of the Supreme Court's rights jurisprudence, it is equally open to them to register their approval by following the Supreme Court's lead when construing cognate provisions of the state constitution.³¹

IV.

The evidence presented by Professor Marshfield provides support, in some degree, for all of these hypotheses. The role of state courts as thoughtful servants of the public good, for example, is illustrated by the structural and tax cases described by Professor Marshfield.³² In these cases, state courts confront technical issues of lower court jurisdiction, separation of powers, and the scope of the charitable tax deduction, clearly grappling with difficult questions concerning how the public good can best be served where constitutional constraints apply in circumstances that have changed considerably since the adoption of the provisions under consideration.³³ For example, in *People v. Banta*, the Colorado Supreme Court chose to overrule prospectively its prior decisional law limiting the power of the governor to make interim appointments to executive offices.³⁴ The court reached this decision because it became convinced that its prior approach may cause, rather than prevent, impasse situations;³⁵ the prior rule, in other words, did not serve the public good, requiring adoption of a different rule.

Similarly, the process of governance through intrajurisdictional dialogue is well-illustrated by *Del Rio v. Crake*.³⁶ That case concerned the constitutionality of a Hawaii law implementing a system of no-fault automobile insurance, in part by limiting the ability of injured motorists to file tort actions against other drivers. In an earlier pair of cases, the Hawaii Supreme Court had invalidated certain applications of the no-fault scheme on the grounds that they violated the equal protection provision of the state constitution.³⁷ The legislature responded by re-enacting the statute, but with

³⁰ GARDNER, *supra* note 19, at 107–08.

³¹ GARDNER, *supra* note 19, at 180–272.

³² See Marshfield, *supra* note 4, at 515–17.

³³ See Marshfield, *supra* note 4, at 515–17.

³⁴ *People v. Banta*, 542 P.2d 377, 381 (Colo. 1975).

³⁵ *Id.*

³⁶ See Marshfield, *supra* note 4, at 511–13. See generally *Del Rio v. Crake*, 955 P.2d 90 (Haw. 1998).

³⁷ Marshfield, *supra* note 4, at 511–12.

an expanded and more explicit legislative history clarifying its intent.³⁸ In *Del Rio*, the court considered this new communication from the legislature and, while carefully reserving for itself final decision on the meaning of the state constitution, decided nevertheless to overrule its prior interpretation of the equal protection provision.³⁹ Interbranch dialogue thus precipitated a change in prevailing constitutional doctrine.

Finally, the evidence adduced by Marshfield also supports the proposition that state courts sometimes participate in active governance by monitoring and either pushing back against or approving federal rulings construing rights accorded duplicate protection at both levels. The tangled history of the Michigan Supreme Court's interpretation of the state constitutional prohibition against double jeopardy⁴⁰ well illustrates this dynamic.

The double jeopardy clauses of the U.S. and Michigan Constitutions are worded in virtually identical terms.⁴¹ Although the two provisions bear no necessary relationship, and Michigan courts are free to interpret them to have different meanings,⁴² the Michigan Supreme Court until 1973 interpreted the state double jeopardy clause in the same way as the U.S. Supreme Court interpreted its federal counterpart.⁴³ In 1973, however, the Michigan Supreme Court became dissatisfied with the U.S. Supreme Court's handling of double jeopardy cases. Persuaded by a concurring opinion by U.S. Supreme Court Justice William Brennan in *Ashe v. Swenson*⁴⁴ criticizing the prevailing federal approach, the Michigan court overruled its prior decisional law and adopted in its place an analysis advocated by Brennan.⁴⁵ Three decades later, the Michigan court again overruled itself, this time returning to the prevailing standard articulated by the U.S. Supreme Court,⁴⁶ and noting that "[i]n recent years, this Court has looked generally to federal double jeopardy jurisprudence in determining whether the successive

³⁸ See Marshfield, *supra* note 4, at 512.

³⁹ See Marshfield, *supra* note 4, at 512.

⁴⁰ Marshfield, *supra* note 4, at 504–05.

⁴¹ The federal clause provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Michigan clause provides, "No person shall be subject for the same offense to be twice put in jeopardy." Mich. Const. art. I, § 15.

⁴² See generally Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980).

⁴³ *People v. Nutt*, 677 N.W.2d 1, 10 (Mich. 2004) (citing *People v. Bigge*, 297 N.W. 70, 73 (Mich. 1941)).

⁴⁴ 397 U.S. 436, 448–70 (1970).

⁴⁵ *People v. White*, 212 N.W.2d 222, 227 (Mich. 1973).

⁴⁶ *Nutt*, 677 N.W.2d at 15.

prosecutions strand of our Double Jeopardy Clause bars a prosecution.”⁴⁷ Thus, the Michigan Supreme Court has swung between expressing its approval of federal doctrine by adopting it under the state constitution; and expressing its disapproval of federal doctrine by loudly and ostentatiously criticizing and deviating from it in construing its own constitutional provision. In so doing, the court has engaged in active governance by successively endorsing, pushing back against, and re-endorsing the exercise of power by the federal judicial branch.

CONCLUSION

Professor Marshfield presents his study as casting doubt on a long-held belief among constitutional scholars concerning the dynamics of constitutional change. In that, he has succeeded. But his study, it seems to me, shows something more—it reveals a state judiciary that, unlike its federal counterpart, conceives of state courts as active participants in constitutional governance. State courts, in his account, attempt assiduously to do their jobs in ways that promote the public good; they engage other branches of government and other judicial systems in useful and potentially beneficial dialogue; and they participate in the dynamic process of monitoring; and, when necessary, resist uses of federal power with which they disagree. State courts thus share with the other branches of state government, actively and without apology, a conception of their role as requiring them to do their best to produce the best possible results for their bosses, the people of the states.

⁴⁷ *Id.* at 13.